Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of Sections of	)	MM Docket No. 92-266
The Cable Television Consumer	)	
Protection and Competition Act	)	MM Docket No. 93-215
of 1992	)	
	)	
Rate Regulation	)	

COMBINED COMMENTS AND REPLY COMMENTS OF THE SMALL CABLE BUSINESS ASSOCIATION

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SUMMARY

The Small Cable Business Association ("SCBA"), a grass roots self-help organization of over 200 independent operators of small cable television systems, through these comments and reply comments, addresses situations where the new rate regulation provisions place disparate burdens on operators of small cable systems.

Any rate regulatory scheme must permit operators of small systems to maintain the same level of service to subscribers and satisfy existing debt obligations. Equally as important, it must not be so restrictive as to impair the ability of small system operators to attract and retain capital. Impairment of capital attraction will stifle continued enhancement of traditional cable services as well as participation in the convergence[1] of the telecommunications industries. In other words, it would be the death knell for these small telecommunications providers, contrary to the policy articulated by Congress,[2] and diametric to the Commission's actions in the regulation of telephone companies.

The SCBA supports the Commission's action to formulate a method to reduce the administrative burdens and costs of compliance of systems with 1,000 or fewer subscribers. The Commission, however, cannot impose a national MSO subscriber cap as that action

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[1]This convergence may well have been accelerated last week when a United States District Court in Virginia held the cable/telephone cross-ownership ban contained in the Cable Act at 47 U.S.C. § 533 unconstitutional and unenforceable. *The Chesapeake and Potomac Telephone Company of Virginia v. United States*, No. 92-1751-A (E.D. Va., August 24, 1993).

[2]One of the five chief policy goals of Congress in enacting the Cable Television Consumer Protection and Competition Act of 1992 ("1992 Cable Act") was to "ensure that cable operators continue to expand, where economically justified, their capacity and the programs offered over their cable systems. 1992 Cable Act, § 2(b)(3).

would establish the definition of a small business without following requisite procedures, including receiving the approval of the Administrator of the Small Business Administration.

The Commission needs to address the regulatory burden on certain cable operators, municipalities and the Commission itself. SCBA suggests certain streamlining of the benchmark calculations, especially with respect to the equipment rate computations, which should be made available to a broad range of small business entities which operate small cable systems.

The Commission has already recognized in its MSO subscriber cap proposal that business entities of a certain size simply do not have sufficient internal capabilities to implement full blown rate computations, whether benchmark or cost-of-service.[3] An appropriate determination of systems eligible for such relief might be measured in terms of annual revenues from cable operations.

Further, SCBA raises considerations for benchmark modifications for systems with certain attributes, irrespective of whether the system operator is a small business. These attributes include density, headend costs and programming costs. Additionally, we suggest modifications to the benchmarks based on system size as the spread of rates between

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[3]*Report and Order and Further Notice of Proposed Rulemaking*, In the Matter of Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992, Rate Regulation, MM Docket No. 92-266 (Released May 3, 1993) ("May 3, 1993 Order") at ¶ 464 and *Memorandum Opinion and Order and Further Notice of Proposed Rulemaking*, In the Matter of Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992, Rate Regulation, MM Docket No. 92-266 (Released August 10, 1993) ("Subscriber Cap Notice") at ¶ 23.

different sized systems under the benchmark methodology cannot be reconciled with the spread of rates found in the Commission's recent Competition Report.[4]

[4]*Report*, In the Matter of Competition, Rate Deregulation and the Commission's Policies Relating to the Provision of Cable Television Service, MM Docket No. 89-600, (Released July 31, 1990) ("Competition Report").

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COMBINED COMMENTS AND REPLY COMMENTS
OF
THE SMALL CABLE BUSINESS ASSOCIATION

I. INTRODUCTION

A. The Small Business Cable Association

Faced with an unprecedented labyrinth of seamless regulations, several small operators decided to form a self-help group to learn, understand and implement the new requirements. Notice of this group's first meeting spread and on Saturday May 15, 1993, one hundred operators met in Kansas City, Missouri. By the end of the day, the Small Cable Business Association ("SCBA") was formed.

While still in its infancy, SCBA has rapidly grown to over 240 members. More than half of them have fewer than 1,000 subscribers in total. Current SCBA members are listed in Exhibit A.

B. The Goals Of SCBA's Comments

The SCBA acknowledges the diligent and endless efforts by the Commission and its staff to craft a regulatory scheme implementing the Congressional mandate. Yet despite conscientious efforts, certain rate regulation provisions and proposals disparately burden operators of smaller cable systems. These comments and reply comments are focused on issues affecting small cable operators and operators of small cable systems.

To provide even greater assistance to the Commission, SCBA is surveying its members to create a database of member attributes. When this process is complete, SCBA may supplement this filing with more specific empirical information.

SCBA recognizes that not all issues can be resolved in a single filing and representatives of its members are available to work with Commission staff to provide additional information as well as to discuss further these and any other regulatory issues.

II. SMALL BUSINESS ISSUES

A. Measures Of Cable Operator Attributes

A prerequisite to any discussion involving categorization of cable operators as "small" is the distinction between the different ways to measure the size of a cable provider:

1. **Cable Operator** - A cable operator can be measured in terms of its aggregate operations across the country (i.e., total subscribers in all systems). This measure is really one of the overall size of the business. Approximately 83 percent of cable operators are multiple system

operators[5], meaning that as a business, an operator may have more than one system. Some small operators, however, have only one system.

2. **Cable System** - Attributes can be measured in terms of subscribers served by cable plant connected to a single headend.

3. **Franchise Area** - The final unit of attribute measurement are those made on an individual cable community basis.

Each of these levels of attribute measurement is valid for certain purposes. The appropriate method of measurement is dependent upon the reasons for the measurement. For example, a cable operator with one 200,000 subscriber system serving one franchise area is distinctly different from an operator serving 200,000 subscribers in 20 cable systems (10,000 subscribers per system) with each system serving 10 franchise areas (1,000 subscribers per franchise area).

B. **Proposed MSO Cap**

In its August 10, 1993 Order, the Commission announced that it would review relief to be provided to cable systems with 1,000 or fewer subscribers in order to reduce the administrative burdens and cost of compliance for these systems as mandated by Congress.[6]

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[5]*Memorandum Opinion and Order and Further Notice of Proposed Rulemaking*, In the Matter of Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992, Rate Regulation, MM Docket 92-266, (Released August 10, 1993) ("August 10, 1993 Order") at ¶ 23.

[6]47 U.S.C. Section 543(i).

The Commission also solicited comment on whether relief should be provided to individual small systems which are affiliated with MSOs. The Commission is considering establishing a maximum subscriber cap in terms of total subscribers, over which systems affiliated with a particular MSO would simply not be able to take advantage of any relief afforded pursuant to 47 U.S.C. Section 543(i)[7].

The Commission seeks comments on the appropriateness of such a cap, as well as the size of the cap. The Commission has suggested that relief may not be available to systems with one million or more subscribers in the aggregate. In essence, the Commission is establishing a point of demarcation between a large and small business entity for purposes of limiting relief from regulatory burdens. By doing so, the Commission defines, for these purposes, what constitutes a small business.

C. An MSO Cap Cannot Legally Be Established In This Proceeding

The imposition of an MSO cap cannot be established legally by the Commission in this proceeding. Congress established specific procedural requirements whenever definitions of small businesses are established by an administrative agency.

1. Small Business Definition

As the Commission is aware, Congress has generally defined a small business as one which is: (1) independently owned and operated; and (2) not dominant in its field of operation[8].

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[7]August 10, 1993 *Order*, at ¶ 23.

[8]15 U.S.C. § 632(a).

2. **Most Cable Operators Do Not Have National Dominance, Therefore, the Small Business Act Provisions Apply**

The Commission has generally determined that both cable television operators as well as telephone companies were not subject to the provisions of the Small Business Act since they were in many cases the exclusive provider of services and, if not exclusive, at least dominant[9].

The determination of dominance has been made by the Commission consistently on a local level. Nevertheless, in the instant rulemaking, the Commission suggests applying a national test (i.e., aggregate subscribership) to establish the regulatory burden to be placed on cable operators. Since the cable industry on a national level is dominated by a few large MSOs,[10] the cable operators potentially impacted by the establishment of an MSO cap are simply not dominant when viewed on a national basis. Therefore, the provisions of the Small Business Act apply to the instant rulemaking.

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[9]*See,* e.g., *Report and Order*, in the Matter of Regulation of Small Telephone Companies, CC Docket No. 86-467 (Released June 29, 1987), 2 FCC Rcd. Vol. 13 3811 at 3815.

[10]The largest 25 MSOs currently service approximately 77 percent of homes receiving cable. According to *Cable Television Developments*, published by the National Cable Television Association (March 1993) at p. 14-A, the largest 25 MSOs provide service to 42,672,235 homes while according to Paul Kagan Associates Inc., approximately 55 million homes had basic cable service as of December 31, 1992. This percent is consistent with the Commission's own fact finding that in 1990, the largest 25 MSOs had a total industry share of 79.58 percent. *Report*, In the Matter of Competition, Rate Deregulation and the Commission's Policies Relating to the Provision of Cable Television Service, MM Docket No. 89-600 (Released July 31, 1990) ("Cable Competition Report"). Even within this group, the 5 largest MSOs currently serve approximately 23 million subscribers, or 43 percent of cable households. *Cable Television Developments*. Therefore, while cumulatively the largest 25 operators have a large market share, operators smaller than the largest 10 serve individually only one to two percent of the national market.

3. Amendment of Small Business Act Provisions Which Impact this Rulemaking

Prior to the enactment of the Small Business Credit Enhancement Act in 1992, § 3(a) of the Small Business Act defined a small business as one that is independently owned and operated and not dominant in its field. The Act also authorized the Administrator of the Small Business Administration ("SBA") to promulgate size standards for various classes of businesses in order to carry out the purposes of the Small Business Act[11]. Under the Act and these size standards, federal agencies were at liberty to craft their own size standards either for compliance with the Regulatory Flexibility Act,[12] or for any other specific regulatory purposes. Thus, the FCC could have defined a small cable operator for purposes of regulatory relief without regard to the SBA's size standards prior to September 4, 1992.

On September 4, 1992, the President signed into law the Small Business Opportunity and Credit Enhancement Act,[13] which amended § 3(a) of the Small Business Act and mandated that the SBA's size standards were to apply to carry out the purposes of any other statute in addition to the Small Business Act. The amendments provided two exceptions: (1) if the other statute provides a different small business definition, such as the Family and Medical Leave Act of 1993 (small business less than 50 full-time employees); or (2) the head of the agency determines that the size standards promulgated by the SBA are inappropriate for a particular regulatory program and follows the procedures set forth in the Small Business Act for crafting a different definition of small business.

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[11]Those size standards can be found at 13 C.F.R. § 121.601.

[12]5 U.S.C. §§ 601-12.

[13]Pub. L. No. 92-366.

4. **What The Commission Must Do To Enact An MSO Subscriber Cap**

Necessarily, the promulgation of any regulations defining a small business, including creation of the MSO subscriber cap, must be performed in accordance with the Small Business Act. Specifically, Congress requires that:

> [T]he head of a Federal Agency may not prescribe for the use of such...agency a size standard for categorizing a business concern as a small business concern, unless such proposed size standard
>
> (A) is being proposed after an opportunity for public notice and comment;
>
> (B) provides for determining, over a period of not less than 3 years...the size of a concern providing services on basis of the average gross receipts of the concern during that period; and
>
> (C) is approved by the Administrator [of the Small Business Administration].

15 U.S.C. § 632(a)(2).

5. **Notice In The Instant Rulemaking Is Insufficient To Establish An MSO Subscriber Cap**

The August 10, 1993 *Order*, while noticing the proposal to establish an MSO subscriber cap, does not provide proper notice regarding the establishment of a small business definition pursuant to the Small Business Act. The notice does not address these issues. The establishment of a small business definition is an issue which should have been separately stated in the notice. It is not a "logical outgrowth" of the intended proceeding.

In fact, it is the basis for the instant proceeding. Therefore, the notice is inadequate[14] pursuant to the provisions of the Administrative Procedures Act[15].

6. **The Proposed Subscriber Cap Cannot Be Defined In Terms Of Aggregate Subscribers**

If the Commission desires to use a national measure of a cable operator's size, it cannot use aggregate subscribers. The Small Business Act requires that the sole consideration must be the amount of annual revenues[16].

7. **Any Commission Determination Requires Small Business Administration Approval**

In the *Further Notice of Proposed Rulemaking* in MM Docket No. 93-266, the Commission requests comments on whether small systems (those with less than 1,000 subscribers) owned by MSOs beyond a subscriber maximum should be given regulatory relief. This attempts to distinguish, for purposes of implementing the 1992 Cable Act, between large and small MSOs. Drawing of such distinctions is tantamount to the development of size standards for the cable industry and the FCC must follow the procedures set forth in the Small Business Act, including the issuance of the standard pursuant to notice and comment rulemaking and obtaining the approval of the Administrator of the SBA. Thus, while the SBCA commends the Commission for seeking

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[14]*See*, e.g., *National Black Media Coalition v. Federal Communications Commission*, 791 F.2d 1016 (2nd Cir. 1986).

[15]5 U.S.C. § 553 and see Excerpt A. *Home Box Office, Inc. v. FCC*, 567 F. 2d 9, 35 (D.C. Cir.), cert. denied, 434 U.S. 829 (1977).

[16]15 U.S.C. § 632(a).

regulatory relief that may apply to its members, the Commission must follow all of the procedural requirements of the Small Business Act.

8. The Congressional Mandate To Provide Regulatory Relief For Certain Systems Does Not Contravene Compliance With The Provisions of the Small Business Act

Although the foregoing procedures are unnecessary where Congress itself has articulated a small business definition in another statute[17], Congress has not established such a standard in the instant case. The mandate for relief from administrative burdens and reduced cost-of-compliance for systems with 1,000 or fewer subscribers[18] is just that; relief for certain *systems*.

Review of Section 2 of the Cable Television Consumer Protection and Competition Act of 1992 ("1992 Cable Act"), in which Congress recites the findings upon which it premised the legislation, shows that Congress clearly recognized the difference between cable systems at the local level and cable operators at the "industry" or national level. In its Statement of Policy, Congress refers to "cable television operators" when discussing issues involving undue market power,[19] as opposed to using the term "system."

The relief provided by Congress stated in terms of "systems" simply cannot be construed under any interpretation to constitute a definition of a cable "business" or cable "operator" for purposes of overriding the provisions of the Small Business Act.

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[17] Id.

[18] 47 U.S.C. § 543(i).

[19] 1992 Cable Act, § 2.

9. The Current SBA Definition Does Not Govern

For general purposes, the SBA has defined a small cable business as one which has less than $7.5 million of annual revenue[20]. This definition, however, is for general SBA use such as for purposes of identifying federal loan guarantee eligibility as well as the receipt of preferences in the awarding of federal contracts. It currently has no established nexus to the determination of thresholds for the imposition of varying degrees of regulatory burdens. It may well turn out that the $7.5 million revenue figure is a sound definition for these programs. But that conclusion can be reached only after a proceeding which is consistent with the requirements contained in the Small Business Act.

D. Procedural Relief Must Be Afforded To Systems With 1,000 Or Fewer Subscribers

1. Compliance Costs Are Fixed Costs For Each Franchise Area

The administrative burdens and costs of compliance with rate regulations are largely fixed for each franchise area, regardless of the number of subscribers. Both the benchmark system and the cost-of-service regulations require substantial efforts on the part of cable operators to determine appropriate rate levels. Even though the benchmark system can be administered a lower cost and with less administrative burden than cost-of-service regulation[21], benchmark regulation is still a burdensome process.

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[20]13 C.F.R. § 121.601 (Major Group 48 - Communications, SIC 4841 - Cable and Other Pay Television Services).

[21]*Report and Order and Further Notice of Proposed Rulemaking*, In the Matter of Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992, Rate Regulation, MM Docket 92-266 (Released May 3, 1993) ("May 3, 1993 Report and Order"), at p. 121 - 122.

By the FCC's own admission, mere preparation of the form used to compute benchmark rates for each franchise area (Form 393) will take an operator an average of 40 hours per franchise area to complete[22]. Based on our work with many large and small cable operators, including many of SCBA's members, the actual investment in time of a cable operator to determining benchmark rates often exceeds 40 hours per franchise area.

The Commission's time estimate includes only the time necessary to determine the benchmark rates. It does not include the substantial time required by local operating personnel to educate municipal leaders about the effect of the computation, explaining and supporting the computation to franchising authority auditors and defending the computations in public hearings.

These costs must be spread over the subscriber base in the franchise area. While arguments can be made that even small franchise areas with more than 1,000 subscribers should be entitled to reduced administrative burdens and costs of compliance, certainly systems with 1,000 and fewer subscribers must be provided with relief in accordance with the Congressional mandate.

2. Relief Should Be Provided To All Franchise Areas With 1,000 Or Fewer Subscribers

SCBA supports the position of the Coalition of Small System Operators that, given the fixed nature of compliance costs for each franchise area, the most relevant measure where relief is appropriate is the franchise area, not at the system level. For

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[22]*Federal Communications Commission Public Notice*, Public Information Collection Requirement Submitted to Office of Management and Budget for Review, accompanied by a letter dated July 13, 1993, signed by Andrew S. Fishel, Managing Director of the Federal Communications Commission.

example, the cost of one system serving 1,000 subscribers in one community is ten times less than a system which serves 1,200 subscribers in 10 communities of 120 subscribers each. Nevertheless, the slightly larger system would not be eligible for reduced administrative burdens under the Commission's proposal, despite its higher cost of compliance.

3. **Streamlining Alternatives**

a. **Establish Equipment Rates Based On Industry Average Costs**

While SCBA may propose additional streamlining alternatives in a supplemental filing once its database is complete, one suggestion for streamlining the current benchmark computation is to simplify computation of equipment and installation rates.

The equipment basket compilations and distribution of costs into specific rates is mind boggling to most operators, as well as their accountants. In general, equipment rates are modest at best with only converter and remote control rentals remaining. Many operators have eliminated additional outlet charges. These changes are confirmed by the trend that rates for tiered services are generally increasing as equipment rates drop[23].

Although Congress requires equipment rates be determined based on an actual cost standard[24], it does not require that the costs be the actual costs of a particular cable system. Rather, the cost information could be applied on an average basis, much as the benchmarks are determined and as the costs of certain small telephone companies are computed[25].

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[23]Thompson, *Why Many Subscriber Rates Will Rise*, Multichannel News, August 23, 1993, at p. 1.

[24]47 U.S.C. § 543(b)(3).

[25]47 C.F.R. §§ 69.601-612.

The Commission could develop average equipment, installation and maintenance costs for small operators, and even for small businesses operating cable systems. The various rates (i.e., remote controls, converters, installations and maintenance calls) would determine the amount of the equipment basket. For example, the appropriate remote control rental would be multiplied by the number of remote control units leased on an annual basis.

It is essential to bear in mind that the size of the equipment basket merely determines the amount of revenue which may not be derived from the provision of tiered cable services. Even if the amount deviated from the amount derived from an actual computation for a particular cable operator, subscribers would not be harmed since the total amount paid for these services would not increase.

Most importantly, such a simple change would have major implications, not only saving cable operators time and reducing their costs of compliance under the benchmark system[26] but, saving the regulators (both municipalities and the Commission) incalculable effort in review and administration of benchmark rate computations[27]. This simplification is parallel to the methods used by the Commission to reduce regulatory burdens on small telephone companies.[28]

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[26]As mandated by Congress in both 47 U.S.C. §§ 543(b)(2)(A) and 543(i).

[27]Congress also mandated that the Commission shall "seek to reduce the administrative burdens on subscribers, cable operators, franchising authorities, and the Commission." 47 U.S.C. § 543(b)(2)(A).

[28]Certain small telephone companies have the option of using average cost information developed on an industry-wide basis. 47 C.F.R. §§ 69.601-612.

b. **Establish Uniform Date For Measurement of External Costs**

The regulations currently require operators to commence measurement of changes in external costs on an annual basis beginning with the date of initial regulation of each tier in each franchise area[29]. Therefore, it is conceivable that a system offering two tiers of programming serving 20 franchise areas could have 40 different time periods for measuring external costs.

This is not only an unworkable situation, but one which thrives on an unnecessary level of detail. The maximum window for beginning the measurement of external costs is 180 days. SCBA suggests that this provision be modified to provide for the measurement changes in external costs beginning September 1, 1993 for all tiered services.

III. THE COMMISSION HAS AUTHORITY TO PROVIDE SUBSTANTIVE AND PROCEDURAL RATE RELIEF TO SMALL CABLE BUSINESSES

A. Congress Gave The Commission Broad Latitude To Design A Rate Regulatory Scheme

As the Commission is aware, Congress delegated broad authority to the Commission to establish a rate regulatory structure that would ensure that the rates for the basic cable service and cable programming service tiers were reasonable[30]. Administrative agencies have broad discretion to design and implement regulatory framework within the confines of the statutory mandates[32].

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[29]47 C.F.R. § 76.922(d)(2)(iv).

[30]47 U.S.C. §§ 543(b)(1) and 543(c)(1).

[32]*Federal Communications Commission v. RCA Communications, Inc.*, 346 US 86, 96 L Ed 1470, 73 S. Ct. 998.

B. **The Commission's Authority To Establish Rates Tailored To Systems With Certain Attributes, Including Smaller Cable Businesses, Is Unfettered**

Under these long-standing principles, the Commission clearly has the discretion to fashion rates which achieve the statutory goals of permitting reasonable rates, such as the ability to include in its considerations specific factors which are typically associated with smaller, more rural cable systems such as density of homes passed, distribution of fixed headend costs, higher programming costs, etc. The Congressional mandate for special treatment for systems with 1,000 or fewer subscribers addresses procedural issues, not the amount of the rates themselves.

C. **Congress' Mandate Of Procedural Relief For Certain Small Systems Does Not Create A "Glass Ceiling" Limiting The Commission's Authority**

Even the Congressional mandate affecting systems of 1,000 or fewer subscribers does not limit the Commission's discretion to design a rate setting mechanism which will impose compliance burdens and costs which are minimized for small systems or franchise areas with more than 1,000 subscribers[33].

In fact, Congress' express words were that the Commission "shall seek to reduce the administrative burdens on subscribers, cable operators, franchising authorities, and the

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[33]The Commission recently adopted a regulatory scheme which provided for a graduated regulatory burden based on the size of the telephone company's local presence. *Report and Order*, In the Matter of Regulatory Reform for Local Exchange Carriers Subject to Rate of Return Regulations, CC Docket No. 92-135, (Released June 11, 1993). In that matter, the Commission reduced the regulatory burden related to rate justification and rate setting on "small" telephone companies (i.e., those with fewer than 50,000 access lines). It is important to note that the relevant measure of size pertained to the telephone company's local presence, not its national attributes. A similar regulatory scheme could easily be applied to cable.

Commission[34]." If Congress had not intended for minimization of the regulatory burden to be a key factor in the development of a rate mechanism, it would have excluded this provision and merely stated that the special relief be afforded to systems with fewer than 1,000 subscribers. It did not do so. In fact, Congress placed this requirement at the top of the list. The Regulatory Flexibility Act, which applies to this proceeding, mandates the Commission to examine less burdensome alternatives which would also achieve the goals of the 1992 Cable Act. As with the Small Business Act, the Regulatory Flexibility Act is cast in terms of measuring the burdens placed on small businesses as opposed to small systems.

Given Congress' direct mandate that the Commission reduce the administrative burdens, coupled with Congress' broad grant of authority to establish a rate regulatory scheme, the Commission has broad discretion to fashion a rate regulatory scheme which imposes a sliding scale of regulatory burden, with the least burden placed on operators of smaller cable systems.

D. Regulatory Burdens Should Be Reduced Not Only For Small Cable Systems, But For Small Cable Businesses

The Commission has already recognized in its MSO subscriber cap proposal that business entities of a certain size simply do not have sufficient internal capabilities to implement full blown rate computations, whether benchmark or cost-of-service[35].

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[34]47 U.S.C. § 543(b)(2).

[35]May 3, 1993 Order at ¶ 464 and Subscriber Cap Notice at ¶ 23.

The Commission should initiate a further rulemaking to identify the appropriate size and measurement unit of a small cable business which should be eligible for streamlined rate regulation procedures. SCBA suggests that an appropriate measure would be in terms of annual revenues received from cable operations.

The appropriate measure may well turn out to be consistent with or parallel to one of those suggested in the Commission's August 10, 1993 Order, or in the concurring statements of Commissioner Barrett. Once again, however, any such determination, including adoption of the existing Small Business Administration definitions, must be made in accordance with the procedural requirements of the SBA, as previously discussed.

IV. MAKING BENCHMARKS WORK FOR SMALLER BUSINESSES

A. Effects Of Failing To Modify Benchmark Rate System

The Commission has repeatedly stated its preference that operators use benchmarks as their principal mechanism to determine the reasonableness of rates[36] as opposed to more arduous cost-of-service filings. Cost-of-service filings are only to be a "backstop[37]."

As discussed in the following paragraphs, to the extent that benchmark rates are tailored to larger systems, smaller systems will be forced into reliance on the backstop cost-of-service methodology. While this disparate treatment may be violative of federal

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[36]*See*, e.g., *Notice of Proposed Rulemaking*, In the Matter of Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992, Rate Regulation, MM Docket No. 93-215 (Released July 16, 1993) ("Cost-of-Service *Notice*") at ¶ 7.

[37]*Id.*

constitutional protections afforded smaller cable operators[38], more practical considerations govern.

If smaller systems are forced into cost-of-service showings, local municipalities and the FCC will be flooded with complex cost-of-service filings which will take much more time and effort to resolve than reviews of benchmark computations. Additionally, the municipalities served by many of these operators are also smaller and more rural in nature, likely lacking the internal expertise to adjudicate a cost-of-service matter. Consequently, they will need to involve external consultants, spending taxpayer dollars on needless complexities.

SCBA offers the following reply comments with respect to various benchmark rate adjustments which have been proposed by the Commission in its Cost-of-Service *Notice*.

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[38]Issues involving violations of equal protection and substantive due process are implicated. *Jacobson v. Massachusetts*, 197 US 11; 49 L Ed 643, 25 S Ct 358 (1904) (An administrative agency's rulemaking power is subject to the limitations of the federal constitution); *Jacobson v. Tahoe Regional Planning Agency*, 558 F2d 928 (9th Cir 1977) *op replaced* 566 F2d 1353 (9th Cir 1977) *aff'd in part and rev'd in part on other grounds* 440 US 391, 59 L Ed 2d 401, 99 S Ct 1171 (1979) (Fifth Amendment due process clause applies to actions of federal agency, here, a regional planning agency); *Mathews v. DeCastro*, 429 US 181, 50 L Ed 2d 389, 97 S Ct 431 (1976) (The Fifth Amendment due process clause encompasses equal protection principles). Administrative regulations in conflict with the constitution or statutes are generally declared null and void. *Harris v. Alcoholic Beverage Control Appeals Board*, 228 Cal App 2d 1, 39 Cal Rptr 192 (1964); *Jimenez v. Weinberger*, 417 US 628, 41 L Ed 2d 363, 94 S Ct 2496 *later app* (1974) 523 F2d 689 (7th Cir 1975) *cert* den 427 US 912, 49 L Ed 2d 1204, 96 S Ct 3200 (1976) (finding application of a statutory scheme of the Social Security Act violative of Fifth Amendment due process rights where, for purposes of determining a child's eligibility for disability insurance benefits, the scheme created a disparate impact by dividing illegitimate children born after the onset of disability to the wage earning parent into two divisions: one of which was deemed entitled to receive benefits without any showing of dependency on the disabled parent and the second was conclusively denied benefits).

B. The Theoretical Cornerstone Of Benchmarks Is Flawed - Not All Cable Systems Earned Profits At Monopolistic Levels

The Commission focused on reducing rates to levels that would have presumably existed had systems actually been subject to effective competition[39]. These excess profits would typically be characterized as "monopolistic profits."

The problem arises that the level of profitability is not uniform throughout the cable industry. Many smaller operators with higher costs may charge more for service, but not proportionately more (i.e., an operator with 50 percent higher operating costs will not be able to charge rates which are 50 percent higher than other operators). In turn, these operators earn lower profits.

The Commission has quantified the average premium charged by operators not subject to effective competition to be 10 percent[40]. The Commission assumes that this percentage as applied to smaller rural systems was entirely attributable to earning excess profits. It has not acknowledged that this rate differential might be attributable to legitimately higher operating and capital costs associated with providing cable services by smaller operators to more rural areas.

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[39]May 3, 1993 *Report and Order*, ¶ 187.

[40]May 3, 1993 *Order* at ¶ 217.